MOTION UNDER 28 U.S.C. § 2255 TO VACATE, SET ASIDE, OR CORRECT SENTENCE BY A PERSON IN FEDERAL CUSTODY

United States District Court	District EASTERN DISTRICT OF NEW YORK
Name (under which you were convicted): Michael Daragjati	Docket or Case No.: 1:11-cr-00838-WFK-1
Place of Confinement: Federal Satellite Low Elkton	Prisoner No.: 79644-053
UNITED STATES OF AMERICA v.	Movant (include name under which you were convicted) Michael Daragjati

MOTION CV 13 3751

KUNTZ, J.

FILED
IN CLERK'S OFFICE
US DISTRICT COURT E.D.N.Y.
★ JUL - 1 2013 ★
BROOKLYN OFFICE

1. (a) Name and location of court that entered the judgment of conviction you are challenging:

   United States District Court
   Eastern District of New York
   225 Cadman Plaza East
   Brooklyn, New York 11201

   (b) Criminal docket or case number (if you know): 1:11-cr-00838-WFK-1

2. (a) Date of the judgment of conviction (if you know): January 24, 2012

   (b) Date of sentencing: June 22, 2012/July 16, 2012

3. Length of sentence: 57 Months

4. Nature of crime (all counts):

   18 U.S.C. §§1951(a)(2) and 3551 et seq. (Count 1)
   18 U.S.C. §§242 and 3551 et seq. (Count 2)

5. (a) What was your plea? (Check one)

   (1) Not guilty ❑ (2) Guilty ☒ (3) Nolo contendere (no contest) ❑

   (b) If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, what did you plead guilty to and what did you plead not guilty to?

6. If you went to trial, what kind of trial did you have? (Check one) Jury ❑ Judge only ❑

7. Did you testify at a pretrial hearing, trial, or post-trial hearing? Yes ☐ No ☒
8. Did you appeal from the judgment of conviction? Yes ☐ No ☒
9. If you did appeal, answer the following:
   (a) Name of court:
   (b) Docket or case number (if you know):
   (c) Result:
   (d) Date of result (if you know):
   (e) Citation to the case (if you know):
   (f) Grounds raised:

   (g) Did you file a petition for certiorari in the United States Supreme Court? Yes ☐ No ☐
   If "Yes," answer the following:
   (1) Docket or case number (if you know):
   (2) Result:

   (3) Date of result (if you know):
   (4) Citation to the case (if you know):
   (5) Grounds raised:

10. Other than the direct appeals listed above, have you previously filed any other motions, petitions, or applications concerning this judgment of conviction in any court?
    Yes ☐ No ☒
11. If your answer to Question 10 was "Yes," give the following information:
    (a) (1) Name of court:
    (2) Docket or case number (if you know):
    (3) Date of filing (if you know):

(4) Nature of the proceeding:

(5) Grounds raised:

(6) Did you receive a hearing where evidence was given on your motion, petition, or application? Yes ❑ No ❑

(7) Result:

(8) Date of result (if you know):

(b) If you filed any second motion, petition, or application, give the same information:

(1) Name of court:

(2) Docket or case number (if you know):

(3) Date of filing (if you know):

(4) Nature of the proceeding:

(5) Grounds raised:

(6) Did you receive a hearing where evidence was given on your motion, petition, or application? Yes ❑ No ❑

(7) Result:

(8) Date of result (if you know):

(c) Did you appeal to a federal appellate court having jurisdiction over the action taken on your motion, petition, or application?

(1) First petition: Yes ❑ No ❑

(2) Second petition: Yes ❑ No ❑

(d) If you did not appeal from the action on any motion, petition, or application, explain briefly why you did not:

12. For this motion, state every ground on which you claim that you are being held in violation of the Constitution, laws, or treaties of the United States. Attach additional pages if you have more than four grounds. State the facts supporting each ground.

GROUND ONE:

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

As fully delineated in the memorandum in support filed herewith, Counsel failed to render the effective assistance of Counsel guaranteed by the Constitution when they failed to ask Judge Kuntz to recuse himself prior to sentencing.

(b) **Direct Appeal of Ground One:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐ No ☐

(2) If you did not raise this issue in your direct appeal, explain why:

(c) **Post-Conviction Proceedings:**

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes ☐ No ☒

(2) If your answer to Question (c)(1) is "Yes," state:

Type of motion or petition:

Name and location of the court where the motion or petition was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(3) Did you receive a hearing on your motion, petition, or application?

Yes ❑ No ❑

(4) Did you appeal from the denial of your motion, petition, or application?

Yes ❑ No ❑

(5) If your answer to Question (c)(4) is "Yes," did you raise this issue in the appeal?

Yes ❑ No ❑

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue:

GROUND TWO:

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

As fully delineated in the memorandum in support filed herewith, Counsel failed to render the effective assistance of Counsel guaranteed by the Constitution when they failed at sentencing to object to Judge Kuntz's inappropriate statements and unsupported findings.

(b) **Direct Appeal of Ground Two:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐ No ☐

(2) If you did not raise this issue in your direct appeal, explain why:

(c) **Post-Conviction Proceedings:**

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes ☐ No ☒

(2) If your answer to Question (c)(1) is "Yes," state:

Type of motion or petition:

Name and location of the court where the motion or petition was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(3) Did you receive a hearing on your motion, petition, or application?

Yes ☐ No ☐

(4) Did you appeal from the denial of your motion, petition, or application?

Yes ☐ No ☐

(5) If your answer to Question (c)(4) is "Yes," did you raise this issue in the appeal?

Yes ☐ No ☐

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue:

GROUND THREE:

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

As fully delineated in the memorandum in support filed herewith, Counsel failed to render the effective assistance of Counsel guaranteed by the Constitution when they failed to review and investigate the records requested by the Court.

(b) **Direct Appeal of Ground Three:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐ No ☐

(2) If you did not raise this issue in your direct appeal, explain why:

(c) **Post-Conviction Proceedings:**

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes ☐ No ☒

(2) If your answer to Question (c)(1) is "Yes," state:

Type of motion or petition:

Name and location of the court where the motion or petition was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(3) Did you receive a hearing on your motion, petition, or application?

Yes ❑ No ❑

(4) Did you appeal from the denial of your motion, petition, or application?

Yes ❑ No ❑

(5) If your answer to Question (c)(4) is "Yes," did you raise this issue in the appeal?

Yes ❑ No ❑

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue:

GROUND FOUR:

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

As fully delineated in the memorandum in support filed herewith, Counsel failed to render the effective assistance of Counsel guaranteed by the Constitution when they ignored Daragjati's expressed desire to seek appellate review of the Court's imposed sentence and the rationale behind said sentence.

(b) **Direct Appeal of Ground Four:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ❑ No ❑

(2) If you did not raise this issue in your direct appeal, explain why:

(c) **Post-Conviction Proceedings:**

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes ❑ No ☒

(2) If your answer to Question (c)(1) is "Yes," state:

Type of motion or petition:

Name and location of the court where the motion or petition was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(3) Did you receive a hearing on your motion, petition, or application?

Yes ❑ No ❑

(4) Did you appeal from the denial of your motion, petition, or application?

Yes ❑ No ❑

(5) If your answer to Question (c)(4) is "Yes," did you raise this issue in the appeal?

Yes ❑ No ❑

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue:

13. Is there any ground in this motion that you have not previously presented in some federal court? If so, which ground or grounds have not been presented, and state your reasons for not presenting them:

Yes. In step with controlling authority, claims of ineffective assistance of Counsel are not properly before the Court on direct appeal and are therefore properly asserted in a 28 U.S.C. §2255 motion. See: Massaro v. United States, 538 U.S. 500 (2003).

14. Do you have any motion, petition, or appeal now pending (filed and not decided yet) in any court for the judgment you are challenging? Yes ☐ No ☒

If "Yes," state the name and location of the court, the docket or case number, the type of proceeding, and the issues raised.

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment you are challenging:

(a) At preliminary hearing: Michael A. Martinez, Esq.
111 John Street, Suite 640
New York, NY 10037

(b) At arraignment and plea: Ronald P. Fischetti, Esq. and Eric Franz, Esq.
747 Third Avenue, 20th Floor
New York, NY 10017

(c) At trial: N/A

(d) At sentencing: Ronald P. Fischetti, Esq. and Eric Franz, Esq.
747 Third Avenue, 20th Floor
New York, NY 10017

(e) On appeal: N/A

(f) In any post-conviction proceeding: N/A

(g) On appeal from any ruling against you in a post-conviction proceeding: N/A

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at the same time? Yes ☐ No ☒

17. Do you have any future sentence to serve after you complete the sentence for the judgment that you are challenging? Yes ☐ No ☒

(a) If so, give name and location of court that imposed the other sentence you will serve in the future:

(b) Give the date the other sentence was imposed:

(c) Give the length of the other sentence:

(d) Have you filed, or do you plan to file, any motion, petition, or application that challenges the judgment or sentence to be served in the future? Yes ☐ No ☐

18. TIMELINESS OF MOTION: If your judgment of conviction became final over one year ago, you must explain why the one-year statute of limitations as contained in 28 U.S.C. § 2255 does not bar your motion.*

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* The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") as contained in 28 U.S.C. § 2255, paragraph 6, provides in part that:

A one-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of —

(1) the date on which the judgment of conviction became final;
(2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making such a motion by such governmental action;
(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

Therefore, movant asks that the Court grant the following relief:

entry of an order vacating the previously-imposed term of incarceration,

or any other relief to which movant may be entitled.

____
Signature of Attorney (if any)

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct and that this Motion under 28 U.S.C. § 2255 was placed in the prison mailing system on __________ (month, date, year).

Executed (signed) on 6/26/13 (date).

____
Signature of Movant

If the person signing is not movant, state relationship to movant and explain why movant is not signing this motion.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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UNITED STATES OF AMERICA,

Plaintiff/Respondent,

v.

MICHAEL DARAGJATI,

Defendant/Movant.

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Criminal No. 1:11-cr-00838-WFK-1

Civil No.__________________

MEMORANDUM IN SUPPORT OF MOTION TO VACATE, SET ASIDE, OR CORRECT SENTENCE PURSUANT TO 28 U.S.C. §2255

* * * * * * * *

COMES NOW the Defendant/Movant, Michael Daragjati ("Daragjati"), pro se, and respectfully offers the following Memorandum in Support of his Motion filed herewith to vacate, set aside or correct sentence. Said Motion is filed pursuant to the statutory authority found in 28 U.S.C. §2255 ("§2255").

I. PROCEDURAL POSTURE

On October 13, 2011, the Office of the United States Attorney filed a criminal complaint in the United States District Court in and for the Eastern District of New York alleging that Daragjati had committed numerous violations of Federal law. See: DE 1[2] In the criminal complaint, the United States alleged that Daragjati committed: (1) a violation of civil rights under color of law; (2) extortion by threat of physical violence; and (3) wire fraud.

[2] - DE shall mean and refer to Docket Entry. The number following the abbreviation shall refer to the number assigned the referenced document by the Court's Electronic Case Management System.

Following the unsealing of the aforementioned cirminal complaint, on October 17, 2011, Daragjati was arrested and presented for his initial appearance, where he entered a plea of not guilty, and was thereafter ordered held without bail pending the presentment of a bail application package. See: DE 3, 8.[2] Though the issue of bail was later raised, Daragjati was never released on bond, and remained in the custody of the United States Marshal Service until he was sentenced. See: DE 16.

On October 21, 2011 and January 5, 2012, respectively, Attorneys Eric P. Franz ("Franz") and Ronald P. Fischetti (Fischetti") entered their appearances on behalf of Daragjati. Franz and Fischetti would respresent Daragjati throughout the remainder of the proceedings in front of this Court.[3]

On January 24, 2012, Daragjati, on the advice of Counsel, executed a waiver of indictment, thereby waiving his Constitutional right to be indicted by a Grand Jury of his peers. See: DE 22. Following the execution of the waiver, the criminal complaint blossomed into a criminal information. In the information, the United States alleged that Daragjati (1) attempted extortion in violation of 18 U.S.C. §§1951(a)(2) and 3551 et seq.; and committed a (2) deprivation of civil rights in violation of 18 U.S.C. §§242 and 3551 et seq. The allegations contained in Count One of the information alleged a felony violation of Federal law, while Count Two alleged a misdemeanor violation of Federal law. See: DE 23.

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[2] - Daragjati was represented at his initial appearance by Attorney Michael Martinez. Mr. Martinez would not represent Daragjati at any further proceedings in this matter.

[3] - Based upon Daragjati's reasonable information and belief, both Franz and Fischetti were, at all times relevant, licensed to engage in the practice of law within the State of New York, and were further permitted to appear in front of this Honorable Court. See: Daragjati Declaration, Exhibit "A".

On January 24, 2012, Daragjati, pursuant to the terms of a written plea agreement, appeared before the Court[2] and entered a plea of guilty as to each of the Counts alleged in the information. At some point following Daragjati's guilty plea, the Court, on its own initiative, contacted Assistant United States Attorney Paul Tuchman ("AUSA Tuchman") and/or other law enforcement officials and requested a copy of Daragjati's Civilian Complaint Review Board ("CCRB") File, and his New York Police Department ("NYPD") Personnel File. The Court's request does not appear on the record, and Daragjati only learned of the request when AUSA Tuchmen partially complied with the request, and in doing so, provided a copy of the CCRB file to Franz and Fischetti. AUSA Tuchman, in the letter accompanying the CCRB file, advised the Court that the NYPD declined to provide Daragjati's Personnel File absent a Court order. See: DE 26. The record does not reflect that the Court issued an order commanding the disclosure of the Personnel file.

Following Daragjati's Pre-Sentence Report ("PSR") Interview with the Office of Probation and Parole, Fischetti filed a letter motion with the Court requesting that it permit Defense Counsel to review the sentencing recommendations made by the Office of Probation and Parole in the PSR. In making the request for disclosure, Fischetti explained to the Court that there appears to be no "logical justification for non-disclosure of the report .... Disclosure of Sentencing Recommendation Reports to the defense is standard" in the Eastern Distrct. See: DE 27. The Court, however, without explanation, on June 11, 2012, denied the request. See: DE 29.

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[2] - The specific terms of the plea agreement and how Daragjati came to accept said agreement are discussed in detail in the background section of this memorandum.

At sentencing, which was held on June 22, 2012, the Court, after presumably reviewing the sentencing[2] submissions filed by the United States and Daragjati's attorneys, as well as the PSR, and after hearing oral arguments, imposed a 48-month term of incarceration as to Count One and a nine-month term of incarceration as to Count Two, to be run consecutively to one another. The Court also imposed a three-year term of supervised release. See: DE 37, 38.

Daragjati's timely §2255 motion and this memorandum in support follow the Court's imposition of sentence.

II. BACKGROUND

Due to the complex nature of the claims raised in Daragjati's §2255 motion, the background section of this memorandum is broken into several subsections. Moreover, to prevent the unnecessary expenditure of Judicial resources, only those matters relevant to the claims raised in Daragjati's §2255 Motion are discussed Infra.

[2] - The sentencing portion of the proceeding is discussed in greater detail in the Background section of this memorandum.

1. EVENTS GIVING RISE OF THE ALLEGATIONS CONTAINED IN COUNT ONE OF THE INFORMATION

On March 2, 2011[2], Daragjati engaged in a recorded telephone conversation with a Confidential Informant ("CI"). During the conversation, Daragjati advised the CI that "they hooked it up and stole my whole Western plow"[3] See: PSR, at 5. During the same call, Daragjati, who was, at the time, a NYPD Police Officer assigned to Borough Crime for the Staten Island Borough, advised the CI that "I'm gonna fu**ing kill somebody bro. I gotta go to the cops now and see if anyone has cameras on the block." See: Id.

Through a network of informants that Daragjati had developed over his years of being assigned to Borough Crime, he was able to identify who had likely stolen his plow. Upon learning of this information, Daragjati filed a police report. However, he was ultimately informed by the District Attorney's Office that there was not enough evidence to prosecute the likely thief[22], and as a result, the case was dropped. See: DE 30.

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[2] - Unless otherwise noted, the information in Sub-Section One and Two comes from the criminal complaint and the PSR. With that said, for the purposes of Sub-Sections One and Two, Daragjati assumes, without conceding, that the Government's version of events is correct and accurate.

[3] - In addition to being a NYPD Officer, Daragjati also ran a home improvement and snow-removal business. The stolen snowplow was used by Daragjati extensively in his day-to-day business operations. See: Daragjati Declaration, Exhibit "A".

[22] - It is worth noting that the individual Daragjati refers to herein as the likely thief and whom the United States referred to as John Doe 2 (See: DE 1), has an extensive criminal record that involves, in large part, theft-related offenses. Indeed, Daragjati has learned that, around the same time as the theft of his snowplow, another NYPD Officer's snow equipment had been stolen and the likely thief was the chief suspect in that theft. See: DE 30; See Also: Daragjati Declaration, Exhibit "A". Daragjati has been unable to confirm if the likely thief was in fact prosecuted for this offense.

After the District Attorney made the decision not to prosecute the likely thief, Daragjati, frustrated with the system, made a profound mistake; he decided to do the one thing that he had advised other citizens not to do over and over again - that is, he took the law into his own hands. According to the United States' version of events, Daragjati and seven other males, on March 4, 2011, lured the likely thief to a vacant parking lot in Staten Island, whereupon one of the men told the likely thief to either return the snowplow to its rightful owner or pay to replace the stolen item. Thereafter, one of the men punched the likely thief. See: PSR, at 7; See Also: DE 1.

Following the alteraction, the CI, in the words of the United States, "unexpectedly" ran into Daragjati at a restaurant in Staten Island. During the "unexpected" meeting, Daragjati showed the CI a picture of the likely thief that he had taken following the altercation. See: DE 1. The photograph of the likely thief showed injuries that one would likely sustain after being punched.

From March 7, 2011 through May 19, 2011, Daragjati and the CI engaged in what the United States, in the criminal complaint, referred to as "consensually-recorded conversations"[2] During these conversations, Daragjati continued to make references about the March 7, 2011 altercation and the theft of his snowplow. In these conversations, Daragjati made no further mention of attempting

[2] - The United States' careful selection of words seems to suggest that Daragjati somehow consented to the conversations being recorded, which he did not. See: Daragjati Declaration, Exhibit "A". Daragjati does not, however, dispute that the CI likely knew and consented to the recording of the conversations. This consent, based upon Daragjati's understanding of New York law, is likely sufficient enough to justify the representations of the United States relating to the consensual nature of the conversation.

to contact the likely thief, nor did he advise that the snowplow or replacement money had been provided. In fact, in the last recorded conversation, Daragjati advised the CI that his insurance carrier had paid him $5,000 to replace the stolen snowplow and that if he continued to try to recover the snowplow from the likely thief[2], it "could be a whole other case" See: DE 1.

At some point shortly after the March 4, 2011 altercation, the likely thief was contacted by law enforcement officials and agreed to identify the persons who were involved in the altercation. To facilitate this request, law enforcement provided the likely thief with a photo array that included Daragjati's photograph. The likely thief, after being shown the array, was unable to identify Daragjati or any other person(s) that were purportedly present during the altercation.

2. EVENTS GIVING RISE TO THE ALLEGATIONS CONTAINED IN COUNT TWO OF THE INFORMATION

On April 15, 2011, Daragjati was assigned to patrol the Stapleton neighboorhood of Staten Island[3] Daragjati, as was custom with his typical day-to-day duties, was in an unmarked police vehicle and was wearing plain clothes. See: DE 1. At approximately 9:30 PM, Daragjati and his partner came across Kenrick

[2] - In a March 15, 2011 recorded conversation, Daragjati opined that he had learned that the likely thief may not have been the one who had stolen the plow, but rather other persons he "ran with". See: PSR, at 9. Given the information now known, Daragjati no longer embraces this belief, and holds true to his original position that the likely thief at least had a role in the theft. See: Daragjati Declaration, Exhibit "A".

[3] - Based upon Daragjati's informed belief, a belief formed in part by his training, the Stapleton neighborhood is a neighborhood that has a high rate of crime. See: Daragjati Declaration, Exhibit "A".

Gray ("Mr. Gray")[2], who, at the time, was walking in the vicinity of the intersection of Targee Street and Laurel Avenue. See: DE 1. Upon exiting the vehicle, Daragjati "Stopped, Questioned and Frisked" Mr. Gray. See: Daragjati Declaration, Exhibit "A". In doing this, Daragjati patted-down Mr. Gray and determined that he did not have a firearm or other contraband. He also removed Mr. Gray's wallet and examined his Driver's License. See: Id.; See Also: DE 1. Thereafter, Mr. Gray complained about the manner in which Daragjati had conducted the permissible frisk. These complaints led to Mr. Gray demanding Daragjati's name and badge number. See: Id. Following the exchange, Daragjati permitted Mr. Gray to leave without writing a citation. Mr. Gray, however, while walking away, told Daragjati to "suck his di** ... pig". See: Daragjati Declaration, Exhibit "A". It was at this point that Daragjati approached Mr. Gray and placed him under arrest. See: DE 1. In addition to Daragjati and his partner, three other plainclothes NYPD Officers witnessed the arrest. Mr. Gray did not resist arrest. See: Id.

There is no evidence in the record to suggest that, during his direct interactions with Mr. Gray, Daragjati uttered any racial epithets or based Mr. Gray's arrest upon anything other than his disrespectful and slanderous statements.

While en route with Mr. Gray to Daragjati's assigned precinct, Daragjati exchanged several text messages and engaged in several phone conversations with his supervising sergeant. The purpose of these exchanges was to discuss what charges Daragjati would press against Mr. Gray. See: DE 1. During one or more of the exchanges, Daragjati informed his sergeant that Mr. Gray had, when he was in the process of being arrested (1) pulled his hand back; and (2) started "pushing off" and "wrestling". See: PSR, at 15. Upon arrival at the precinct, Daragjati informed Mr. Gray that he could have gone home that night, but he "really did not like being disrespected" See: Id., at 17.

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[2] - The United States, in both the complaint and information, refers to Mr. Gray as John Doe 1. With that said, because Mr. Gray has, in public Court filings and in media outlets, identified himself as John Doe 1, there is no longer a need to shield his identity. If the Court does not embrace this position, Daragjati would respectfully request leave to file a redacted copy of the memorandum.

In the early morning hours of April 16, 2011, Daragjati swore out a criminal complaint against Mr. Gray, charging him with resisting arrest and disorderly conduct. See: DE 1. On April 17, 2011, Mr. Gray appeared before the Richmond County Criminal Court and plead guilty to the disorderly conduct charge. Though Mr. Gray made a solemn admission in Court confirming his guilt, his plea, on February 9, 2012, was set aside and the case dismissed and sealed. See: Gray v. City of New York, U.S. Dist. 12-CV-0197 (E.D.N.Y. 2012), Document 8, at 43.

On April 16, 2011, well after the criminal complaint against Mr. Gray had been sworn out, law enforcement intercepted a private telephone conversation, where Daragjati told a private citizen that the night before, "another n**ger got fried" See: PSR, at 20. Law enforcement, on April 30, 2011, and again on May 4, 2011, intercepted additional private phone conversations involving private citizens and Daragjati. In these phone conversations, Daragjati was recorded as making inappropriate, distasteful and derogatory racial remarks. These remarks were, however, in no way related to the arrest of Mr. Gray or to Daragjati's employment with the NYPD. See: PSR, at 19-22.

On January 13, 2012, Mr. Gray filed a civil complaint in the United States District Court in and for the Eastern District of New York. Mr. Gray subsequently amended the complaint on April 23, 2012. In his Amended Complaint, Mr. Gray alleged that, on three separate occasions, within an approximate six-month period, he was charged with disorderly conduct by members of the NYPD[2]. Mr. Gray alleged that each of the disorderly conduct charges arose because of law enforcement's "abuse of authority". Mr. Gray alleged that these purported false charges occurred on October 8, 2010, December 9, 2010, and April 15, 2011. By Mr. Gray's admission, Daragjati was involved only in the April 15, 2011 incident. As of the filing of Daragjati's §2255 motion, Mr. Gray's civil case remains pending. See: Gray, supra.

3. DARAGJATI'S ARREST

On October 17, 2011, Daragjati was arrested at the Internal Affairs Department of the NYPD. See: PSR, at 25. Following his arrest, Daragjati, who is from a large and supportive family (See: Daragjati Declaration, Exhibit "A")[3], instructed them to seek out and retain Counsel to defend him against the charges. In stride with this instruction, Daragjati's family, on reference from a close family friend, sought out Fischetti. Initially, however, Fischetti advised that he could not represent Daragjati, because of the racial overtones of the case[2] It was explained that Fischetti felt that his involvement with the case would interfere with his position on the Board for the New York Commission on Civil Rights[3] Fischetti, however, advised that his partner, Franz, would be willing to "take the case". See: Declaration of Mark Daragjati, Exhibit "B".

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[2] - Each disorderly conduct citation was written by a different member of the NYPD.

[3] - The information contained in this section does not necessarily appear in the record. However, the authenticity of the statements is verified by the various declarations filed herewith.

Daragjati's early interactions with Counsel were limited to Franz and his associates. During those early interactions, Daragjati repeatedly told Franz that he wanted to "fight the charges", because he was "innocent". See: Daragjati Declaration, Exhibit "A". At some point prior to the filing of the information, Fischetti again entered the picture, and in doing so, advised that he could now serve as Daragjati's Counsel, because he had been assured that "race was no longer an issue" See: Declaration of Mark Daragjati, Exhibit "B". When Fischetti agreed to represent Daragjati, he advised that he would not receive any direct payment from Daragjati, instructing him to instead pay only Franz for his services. See: Daragjati Declaration, Exhibit "A".

4. DARAGJATI'S DECISION TO PLEAD GUILTY

Daragjati made the decision to waive his Constitutional right to be indicted by a Grand Jury and to his right to Trial based upon the representations of Franz and Fischetti. See: Id.

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[2] - Because of Daragjati's position, and the nature of the crimes for which he was charged, both local and national media reported on Daragjati's arrest. See, e.g.: New Blue Learn About City's Diversity Needs. NY 1 News, http://manhattan.ny1.com/content/top_stories/153152.

[3] - In the interest of clarity, the exact name of the committee on which Fischetti served cannot be recalled. However, it is believed that this is, in essence, the name of the committee.

These representations included: (1) an assurance that "race would not play a role in fashioning any prison sentence"; (2) that the United States would not oppose a below-guidelines sentence; and (3) that the wire fraud count alleged in the criminal complaint would not be prosecuted. See: Id.

Consistent with Daragjati's decision to plead guilty, the United States caused the aforementioned information to be filed with the Court. At the same time, a plea agreement was drafted by the United States and presented to Daragjati by Franz and Fischetti. In the plea agreement, the parties agreed that the applicable guideline offense level for the offenses for which Daragjati had agreed to plead guilty would be 26.[2] See: DE 25. After awarding the "acceptance of responsibility reduction" authorized by U.S.S.G. §3E1.1, the plea agreement contemplated a final base offense level of 23, which, when coupled with a criminal history category of I,[3] yielded, according to the plea agreement, an advisory sentence range of 46-57 months. See: Id. With that said, the parties also acknowledged in the plea agreement that "the guidelines are advisory and the Court is required to consider any applicable guideline provision as well as other factors enumerated in 18 U.S.C. §3553(a) to arrive at an appropriate sentence"[2] See: Id.

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[2] - This was the offense level for the allegations contained in Count One of the information. The allegations contained in Count Two carried an offense level of 16, with a statutory maximum term of incarceration of one year.

[3] - Prior to the filing of the criminal complaint in this proceeding, Daragjati had no serious negative run-ins with law enforcement. See: Daragjati Declaration, Exhibit "A".

In exchange for the concessions offered by the United States, the plea agreement stipulated that Daragjati would:

> "(1) Agree not to file an appeal or otherwise challenge, by petition pursuant to 28 U.S.C. §2255 or any other provision, the conviction or sentence in the event the Court imposes a term of imprisonment of 63 months or below;[3] (2) not oppose his termination by the New York City Police Department and that he will not thereafter apply for, occupy, or work in any position, civilian or uniformed, with any Federal, State or local law enforcement or prosecutor's office, agency or department"

See: Id.

On the advice of Counsel, Daragjati executed the plea agreement without alteration, and thereafter, as required by the plea agreement, appeared before the Court and formally entered a plea of guilty as to both counts alleged in the information. See: DE 24.

5. JUDGE KUNTZ AND HIS PRIOR INTERACTIONS WITH THE NYPD

Because one or more of Daragjati's claims relate, in whole or in part, to the actual and/or perceived partiality of Judge Kuntz, it is of importance to explain his background and off-the-record actions.

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[2] - 18 U.S.C. §3553(a) provides that the Court must consider:

> "(1) The nature and circumstances of the offense and the history and characteristics of the Defendant; (2) the need for the sentence imposed; (3) the kinds of sentences available; (4) the kind of sentence range [established for the offense]; (5) all pertinent policy statements; (6) the need to avoid unwarranted sentence disparities among Defendants with similar records who have been found guilty of similar conduct; and (7) the need to provide restitution to all victims of the offense."

See: 18 U.S.C. §3553(a).

[3] - As discussed Infra, the waivers contained in the plea agreement should be deemed unenforceable.

From its inception, the case against Daragjati was assigned to the Honorable William F. Kuntz ("Judge Kuntz"). Prior to his appointment to the Federal Bench on October 4, 2011, Judge Kuntz served as a commissioner with the New York City Civilian Complaint Review Board ("CCRB"). Judge Kuntz was appoitned to the CCRB by the Borough of Brooklyn. According to Judge Kuntz's biography, his role on the CCRB was to serve as "a commissioner [where he supervised] hundreds of investigations into allegations of abuse by members of the New York City Police Department" See: www.fed-soc.org/publications/author/william-kuntz (last visited on June 5, 2013).

It is no secret that the members of the CCRB and the NYPD have a contentious relationship. This contentious relationship led the Board Chair, in 2007, to publicly criticize the NYPD. In particular, the Chairwoman stated in the Board's semi-annual report that:

> "We continue to see, however, a discrepancy between our disciplinary recommendations on cases and their actual outcome at the Police Department. As this report shows, the rate at which the department has chosen not to discipline officers which the CCRB found committed misconduct is at an all-time high."

See: Letter from the Chair, Exhibit "C".

6. EVENTS LEADING UP TO DARAGJATI'S SENTENCING

As previously noted, after entering a plea of guilty, Judge Kuntz, in an off-the-record ex parte request, ordered the United States to provide copies of Daragjati's CCRB file and his

[2] - The Chairwoman's 2007 statements are relevant to this proceeding because Daragjati's first CCRB complaint was filed in 2007.

NYPD Employment File[2] See: DE 26, 29. The United States ultimately provided Judge Kuntz with the requested CCRB file.

In the provided CCRB file, which was not formally entered into the record, it revealed that Daragjati had two CCRB complaints; one complaint that was filed in 2007, and the other, more recent, which was filed in 2011. Upon learning that the CCRB files were provided by the United States to Judge Kuntz, Daragjati's attorneys questioned AUSA Tuchman, who advised that, in providing the requested file, he was simply complying with the Court's request and did not intend to introduce the file at sentencing. See: Daragjati Declaration, Exhibit "A". Upon learning of the request from Judge Kuntz, Daragjati instructed his family to advise his attorneys to "study the CCRB File" and to make sure that his NYPD arrest record and peer performance evaluations were made available to the Court. See: Nicole Daragjati Declaration, Exhibit "D". To the best of Daragjati's informed belief, neither Franz not Fischetti carefully reviewed the CCRB File in advance of sentencing, because, in sum, their belief was that none of the information contained therein was material to the matters before the Court. See: Daragjati Declaration, Exhibit "A".

In advance of sentencing, both the United States and Daragjati's attorneys filed documents with the Court outlining their positions and beliefs as to the appropriate punishment for Daragjati's admitted criminal actions. See: DE 30, 33.

[2] - The investigation and findings of the CCRB panel are typically not made available to the public, and are generally not available for disclosure under New York's Freedom of Information Law unless or until the officer is separated from employment and then authorizes the release.

In the sentencing memorandum filed on Daragjati's behalf, Franz and Fischetti argued in part that "the type of extortion present in this case warrants leniency" and that "anything additional [considering the 8 months he had already served] for the civil rights violation would be, we respectfully submit, greater than necessary" See: DE 30. As a result of these offense characteristics, coupled with Daragjati's personal characteristics, Franz and Fischetti averred in the memorandum that a below-guidelines sentence was appropriate. See: Id.[2]

The United States, in their sentencing submission, referred to Daragjati's extortion charge as a case of vigilante justice, and offered that "vigilante justice is unacceptable in a civilized society - only the due process of law can reasonably assure that those who are punished for their crimes truly merit such punishment".[3] As to the civil rights violation, despite past assurances,[22] and despite the fact that Daragjati made no racially derogatory statement in Mr. Gray's presence, the United States averred that, in arresting Mr. Gray, Daragjati acted with "racial animus". See: DE 33. In light of these factors, the United States submitted that Daragjati should receive a sentence of 46-57 months on Count One and a statutory maximum sentence of 12 months on Count Two, to be run concurrently with one another. See: Id.

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[2] - The sentencing submission did not specifically request a guideline departure and/or variance.

[3] - With all due respect to the United States, the guarantee of due process does not guarantee that only the guilty are punished for crimes, as the guarantee of due process simply guarantees the accused the right to be heard; it does not mean that, if they are innocent, a jury of their peers and/or a Court will, in every single case and circumstance, find them not to have committed the offense for which they were charged.

[22] - Fischetti repeatedly advised Daragjati and his family, in advance of sentencing, that he had been assured by the United States that race would not play a role in fashioning a term of incarceration. See: Daragjati Declaration, Exhibit "A"; See Also: Declaration of Mark Daragjati, Exhibit "B".

In the days leading up to sentencing, Fischetti and Franz met with and/or spoke to Daragjati on several occasions. During each of these conversations, they explained that, though they could not "guarantee" that the Court would impose a specific term of incarceration, they felt "confident" that, given the circumstances of the case, the Court would impose a significantly below-guidelines sentence. See: Daragjati Declaration, Exhibit "A". It was also during these meetings/communications that Fischetti famously told Daragjati that he felt prepared for anything that would come up at sentencing, and if need be, he "could handle any surprises on his feet" See: Id.

At sentencing, which was held on June 22, 2012, the only objection Fischetti placed on the record related to the Court's refusal to grant Daragjati access to the sentencing recommendation offered by the Office of Probation and Parole. See: ST 8:22-9:15[2]. Specifically, Fischetti stated that:

> "One thing I would like to put on the record, your Honor, that I do with other judges, is that I object, respectfully, that we do not have the recommendation of the Probation Department. In my view, your Honor, a defendant should have everything that the judge has to consider what sentence he's going to get. Your Honor has that recommendation, I do not. Your Honor refused to give it to me, which is Your Honor's right here in the Eastern District. There are a number of judges who do give it to defense counsel here, and every judge in the Southern District does

[2] - ST shall mean and refer to Sentencing Transcript. The first number following the abbreviation shall refer to the specific page in the transcript. The second number shall refer to the line(s) on the referenced page.

it. But as I understand from Probation, and I understand from reading the law, there is nothing I can do to compel your Honor. However, I do want to put it on the record that respectfully we object to that because, quite frankly, I think eventually, Judge, the law is going to change on that, because I think there's a need for transparency, and I think that since the judge knows what the recommendation is, and defense counsel doesn't, and the government doesn't oppose that, that we should get it."

See: Id.

Thereafter, Fischetti proceeded to reiterate the arguments raised in the previously-filed sentencing memorandum. The Court also heard from Daragjati and AUSA Tuchman. There were no witnesses called at sentencing.

The Court, prior to imposing its sentence on Daragjati, explained:

> "The experience of your life, sir, is the material of Greek tragedy, both for yourself and for the victims of your criminal behavior, victims that include both those who you abused and those who you betrayed. Your wonderful and loving family and your courageous colleagues in the best police force in America. You see, you never stumbled over your career. Sadly, quite to the contrary, you methodically destroyed your career. You repeatedly kicked your career to the curb. You kicked it to pieces, and, worst of all, you did this by hurting the very people you had sworn to serve and to protect and to defend. New York proudly handed you a badge of honor, but you beat that shield of civic honor into a sword of criminal personal activity.
>
> Ironically, you, yourself, described your sorted activities on a recorded wire, because the government suspected you of insurance fraud and yet was never able to bring those claims against you. You had numerous chances to clean up your act. A citizen accused you of telling him to 'shut your ni**er mouth' in one of those CCRB complaints. You had a case where you failed to file a stop and frisk report, even though you said you stopped to frisk the guy. You had a chance to clean up your act when you were sued for a civil rights violation in this very courthouse, in an action before my colleague Judge Gleeson, in which you denied all liability as the City paid a settlement of $12,500 on your behalf, allowing you to continue as a police officer. And again when you were sued in yet another

> case pending in this courthouse, before my colleague Judge Weinstein, in which you were again sued for civil rights violations, and again denied all liability, as the city paid a second settlement in the amount of $57,500. As you heard today, there is a third lawsuit pending, that one before Judge Korman, and time will tell whether or not there's any validity to the allegations in that complaint, and this court makes no assumptions one way or the other. But each of those five complaints was brought against you by African-American men asserting civil rights violations and violations of constitutional law."

See: ST 49:7-50:20.

The Court went on to explain that Daragjati's actions were akin to the actions taken by the actor in the motion picture "Carlito's Way"[2] Thereafter, the Court offered that:

> "You see, when that character portrayed by Mr. Washington called his rookie partner, played by Caucasion actor Ethan Hawkes, 'my ni**er', that Denzel character was not being racist in any narrow traditional way. He was like you, being a controlling cop, a cowardly cop, a criminal cop. He was reflecting that same culture, the worst of that culture that you identified in your submission to this court. That is a culture that threatens the very rule of law, and that is a culture that threatens to denigrate anyone, or anyone who would dare to cross you, and those who buy into that culture. Well, that culture must come to an end. The law does not sanction that culture. This court does not sanction this culture. And the better angels of the New York City Police Department do not sanction that culture. Today is not simply your training day, today is also your earthly judgment day."

See: ST 53:5-20[3] (emphasis added).

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[2] - Specifically, the Court stated Daragjati "deliberately rejected the cop way, embracing the anti-cop way, the criminal way, Carlito's way, seeking to retrieve your own personal property, a snowplow, in the age of global climate change" See: ST 51:19-21.

[3] - The Court did not hesitate to use the racially-offensive word used by the actor. Daragjati, however, has chosen to omit the word from this filing, as he has learned, perhaps better than anyone, that the word has no place in private conversation, much less in a professional setting, where one person is sitting in judgment of another.

After pronouncing the date to be Daragjati's "earthly judgment day", Judge Kuntz, over the request of Fischetti and the recommendations of the United States and the presumed recommendation of Probation and Parole, imposed a 48-month term of incarceration as to Count One, followed by a nine-month term of incarceration as to Count Two, to be run consecutively to one another. The Court then, instead of advising Daragjati of his appeal rights, simply offered that:

> "Pursuant to the terms and conditions of your guilty plea, you would have the right to appeal the sentence, were it to have exceeded 63 months. It does not."

See: ST 54:17-19.

7. EVENTS TAKING PLACE AFTER SENTENCING

After being incorrectly assured, prior to sentencing, by Fischetti and Franz that (1) the CCRB file would not play a role in the sentence; (2) that race would not play a role in the sentence; and (3) that a below-guidelines sentence was likely, Daragjati was stunned following the Court's imposition of judgment. See: Daragjati Declaration, Exhibit "A". Fischetti attempted to calm this astonishment prior to Daragjati being led from the Courtroom by the Marshals, when he advised that he would "stop by in a few days" to discuss things. See: Id.

After the imposition of sentence, Franz and Fischetti exited the Court with Daragjati's family. It was during this time that two important things happened. First, Daragjati's brother Jak asked Franz if an appeal could be filed. In response to this, Franz advised that "there was no way to appeal due to the language of the plea agreement" See: Jak Daragjati Decalration, Exhibit "E".

Second, Fischetti was approached by a reporter and proclaimed, despite ample evidence otherwise, that Daragjati "is a racist" See: "Racist NYPD Cop Sentenced to Nearly 5 Years for False Arrest and Extortion", June 22, 2012, http://www.huffingtonpost.com/2012/6/22/racist-nypd-cop; See Also: Nicole Daragjati Declaration, Exhibit "D"; Daragjati Declaration, Exhibit "A"; Mark Daragjati Declaration, Exhibit "B".

Upon arriving back at MDC Brooklyn, Daragjati was approached by another inmate who advised him that his attorneys instructed him to tell Daragjati to appeal, because what "the Judge did was wrong"[2] See: Daragjati Declaration, Exhibit "A". This advisement reaffirmed Daragjati's "gut feeling" that the Court improperly considered the CCRB file and made inappropriate, as well as inaccurate, references at sentencing[3] This "gut feeling" led to Daragjati contacting his wife and instructing her to tell Franz and/or Fischetti to appeal the Judge's sentencing order. See: Id. However, despite complying with the request and reaching out to Franz, no appeal was filed. See: Nicole Daragjati Declaration, Exhibit "D". It was ultimately explained to Daragjati by both his wife and brothers that no appeal was and/or could be filed "no matter what", because of the language contained in the plea agreement. See: Id.; See Also: Declaration of Jak Daragjati, Exhibit "E".

[2] - Though Daragjati cannot recall the inmate's name, he does recall the inmate advising that he was sentenced "right after" he was, and that his attorneys were in the Courtroom to observe Judge Kuntz's "sentencing style".

[3] - One specific example: The Court commented that Daragjati's actions had cost the City of New York $12,500 in a civil settlement. This case was settled by the City because it was determined that the cost of settlement would be less than the cost of defending the case at Trial. Daragjati, who received a commendation for his actions in the underlying arrest, instructed the City to fight the claim, but his request was not honored.

Despite Fischetti's assurances at sentencing that he would come visit Daragjati "in a few days" to discuss things, no visit has, as of the filing of Daragjati's §2255 motion, taken place[3].

III. LEGAL ARGUMENT

The Supreme Court has long recognized there to be "no higher duty of Court under our Constitutional system than the careful processing and adjudication of petitions for writs of Habeas Corpus, for it is through such proceedings that a person in custody charges that error, neglect or evil purpose has resulted in his unlawful confinement and that he is deprived of his freedom contrary to law" See: Harris v. Nelson, 394 U.S. 286, 292 (1969). To permit the Courts to discharge this duty, Congress codified §2255 and, in doing so, made it the vehicle by which a Federal prisoner may challenge the Constitutionality of his sentence. In a §2255 motion, a prisoner may move his sentencing Court[2] to vacate, set aside or correct his conviction and/or previously-imposed term of incarceration on the grounds that "the sentence was above the maximum authorized by law or it is otherwise subject to collateral attack" See: §2255. The grant of §2255 relief is not done lightly, as the Supreme Court has explained that §2255 relief "is reserved for transgressions of a Constitutional right and for a narrow range of injuries that could not have been raised on direct appeal and, if condoned, result in a complete miscarriage of justice" See: United States v. Frady, 456 U.S. 162, 168 (1981). To prevail in a motion where a Constitutional error is alleged, the record must reflect a Constitutional error of such magnitude that it had a substantial injurious effect on the outcome of the proceeding" See: Brecht v. Abrahamson, 507 U.S. 619, 637 (1993).

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[2] - This Court, as the Sentencing Court, has jurisdiction to hear and consider Daragjati's §2255 motion pursuant to 28 U.S.C. §1331.

[3] - Franz did stop by and meet with Daragjati. This meeting took place nearly five weeks after sentencing. Daragjati, during this meeting, told Franz that he wanted to appeal, but was told that he "could not" because of the plea agreement. See: Daragjati Declaration, Exhibit "A".

With the above legal framework in mind, it is respectfully submitted that, for the reasons stated herein, Daragjati's conviction is vulnerable to collateral attack[2] because Frans and/or Fischetti, during their representation, failed to serve as the Counsel guaranteed by the Constitution[3].

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[2] - To be timely, a §2255 motion must be filed within the time frame set forth in §2255(f). §2255(f) provides in pertinent part that:

> "A 1-year period of limitation shall apply to a motion under this section. This limitation period shall rum from the latest of --
> (1) The date on which the judgment of conviction becomes final;
> (2) The date on which the impediment to making a motion created by Governmental action in violation of the Constitution or laws of the United States is removed, if the Movant was prevented from making a motion by such Governmental action;
> (3) The date on which the right asserted was initially recognized by the Supreme Court if that right has been newly recognized by the Supreme Court and made retroactively available to cases on collateral review; or
> (4) The date on which facts supporting the claim or claims presented could have been discovered through the exercise of due diligence."
> See: 28 U.S.C. §2255(f).

With that said, as Daragjati was sentenced on June 22, 2012, and the final judgment was entered on July 16, 2012, and as Daragjati did not seek appellate review, his conviction became final for §2255 purposes on either July 6, 2012 or July 30, 2012, depending upon the Court's interpretation of controlling authority. Therefore, pursuant to 28 U.S.C. §2255(f)(1), Daragjati's §2255 motion is timely so long as it is filed with this Court, at a minimum, on or before July 6, 2013. See: Clay v. United States, 537 U.S. 522, 524 (2003) (holding that, for the purposes of a §2255 filing, a conviction becomes final when the time in which to seek review from the next-higher Court expires).

[3] - The Sixth Amendment to the Constitution provides that:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the Assistance of Counsel for his defence."

See: U.S. Cons. Amd. VI.

1. INEFFECTIVE ASSISTANCE OF COUNSEL STANDARD

The Supreme Court has long held that a criminal Defendant's right to Counsel is the right to the "effective assistance of Counsel" See: McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970). If a criminal defendant alleges that Counsel failed to render the Constitutionally-mandated effective assistance of Counsel, they are charged with satisfying the now-familiar two-prong Strickland test. See: Bennett v. United States, 663 F. 3d 71, 84 (2d Cir. 2011) (discussing Strickland in the post-conviction context).

Under the first prong of the Strickland test, a Defendant is charged with proving that Counsel's "performance was deficient" (See: Strickland v. Washington, 466 U.S. 668, 687 (1984)), that is, that Counsel made errors so serious that he was not functioning as the Counsel guaranteed by the Constitution. See: Id. To satisfy this prong, Daragjati must identify specific "acts or omissions that were outside the wide range of professionally-competent assistance" See: Id., at 690. As to the second prong, it must be proven that Counsel's deficient performance was prejudicial, and "that there is a reasonable probability that but for Counsel's unprofessional errors, the result of the proceeding would have been different" See: Id., at 694; See Also: Fields v. Atty. Gen. of Md., 656 F. 2d 1290, 1297-99 (4th Cir. 1992). The reasonable probability standard has been identified as "a probability sufficient to undermine confidence in the outcome" See: United States v. Bagley, 473 U.S. 667, 682 (1985). As explained by a sister Circuit, this requires Daragjati to prove that, with a different lawyer, it would have "produced a different result" See: Ward v. United States, 995 F. 2d 1317, 1321 (6th Cir. 1993). It is not enough for Daragjati to satisfy only one of the Strickland prongs, as both must be satisfied before he can establish an entitlement to relief. See: Bennett, supra, at 85.

With the Supreme Court's interpretation of a criminal Defendant's Sixth Amendment right to Counsel, and the standard that must be met to establish the entitlement to relief, the focus must now turn to determining at what point in the underlying proceeding does a criminal Defendant's right to the effective assistance of Counsel attach. To this end, the Supreme Court has determined that this protection is available to Defendants not only at Trial, but also at all critical stages of the proceeding. See, e.g.: Coleman v. Alabama, 399 U.S. 1, 9-10 (1970). In explaining this rationale, the Supreme Court explained that, "in addition to Counsel's presence at Trial, the accused is guaranteed that he need not stand alone against the State at any stage of the prosecution, formal or informal, in Court or out, where Counsel's absence might 'derogate from the accused's right to a fair trial'" See: United States v. Wall, 388 U.S. 218, 226 (1967) (footnote omitted).

To establish whether a particular proceeding was a "critical stage", the inquiry must be limited to determining where "potential substantial prejudice to Defendant's rights inheres in the ... confrontation ... and [where] Counsel's ability [can] help avoid such prejudice" See: Coleman, supra, 11 (brackets added). Although numerous proceedings in addition to Trial have been recognized as being critical stages of the criminal justice process, the three most-often recognized are the plea phase, the sentencing phase, and the appellate phase of a proceeding. See: Gardner v. Florida, 430 U.S. 349, 358 (1977) (discussing a criminal Defendant's right to the effective assistance of Counsel in the sentencing phase of a proceeding); See Also: Lafler v. Cooper, ___ U.S. ___ (2012)[2] (discussing a criminal Defendant's right to the effective assistance of Counsel during the plea bargaining phase of a proceeding); See Also: Evitts v. Lucey, 469 U.S. 387 (1983) (discussing a criminal Defendant's right to the effective assistance of Counsel on appeal).

Prior to the Supreme Court's decision in Missouri v. Frye, ___ U.S. ___ (2012), and Lafler, supra, most claims of ineffective assistance of Counsel during the plea phase of a proceeding centered around Counsel's alleged failure to fully inform a criminal Defendant as to the consequences of accepting a plea offer extended by the United States. See, e.g.: Hill, supra. However, with these two landmark decisions, the standard has somewhat changed. The Supreme Court opined that the restatement was necessary because:

> "Criminal justice today is for the most part a system of pleas, not a system of trials.... The right to adequate assistance of Counsel cannot be defended or enforced without taking account of the critical role plea bargaining plays in securing convictions and determining sentences."

See: Id.

The Supreme Court expanded upon this explanation to hold that "the reality [is] that plea bargaining has become central to the administration of the criminal justice system.... [the

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[2] - The Supreme Court, in Lafler, expanded upon its previous holdings in Montejo v. Louisiana, 566 U.S. 778 (2009) and Padilla v. Kentucky, 599 U.S. ___ (2010).

Sixth Amendment right to Counsel] extends to the plea bargaining process ... [where] defendants are entitled to the effective assistance of Counsel" See: Frye, supra. Put simply, in the post-Lafler and -Frye era, the United States can no longer "point to the guarantee of a fair trial as a backstop that inoculates errors in the pre-trial process" See: Id.[2]

Turning to claims of ineffective assistance of Counsel that occur during sentencing, it must be proven that, but for Counsel's deficient performance, the Defendant "would have received a lesser sentence" See: Glover v. United States, 531 U.S. 198, 203 (2001). It is, however, not a requirement that the deficient performance at sentencing led to years being tacked onto a sentence, as it has long been recognized that "any amount of actual jail time has Sixth Amendment significance" See: Id. With that having been said, when weighing the merits of claims of ineffective assistance of Counsel during the sentencing phase, the Court must not engage in "Monday morning quarterbacking" (See e.g.: Harris v. Reed, 294 F. 2d 871, 877 (7th Cir. 1990)), and as a result, a Defendant is charged with offering near-indisputable evidence in support of the claim.

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[2] - In applying the facts present in Lafler to its new interpretation of the law, the Supreme Court explained that:

"First, Petitioner and the Solicitor General claim that the sole purpose of the Sixth Amendment is to protect the right to a fair trial. Errors before trial, they argue, are not cognizable under the Sixth Amendment unless they alter the fairness of the trial itself.... The Sixth Amendment, however, is not so narrow in its requirement.... The Constitutional guarantee applies to pre-trial critical stages that are part of the whole course of a criminal proceeding."

See: Lafler, supra.

2. EFFECT OF GUILTY PLEA ON DARAGJATI'S §2255 MOTION

It is beyond dispute that an agreement to plead guilty is a solemn admission by a criminal Defendant that he "committed the crime charged against him" See: North Carolina v. Alford, 400 U.S. 25, 32 (1970). However, the Supreme Court has long recognized that "the Constitutional rights of criminal Defendants are guaranteed to the innocent and the guilty alike" See: Kimmelman v. Morrison, 477 U.S. 365, 380 (1986). Indeed, the Supreme Court, in Lafler, recently reiterated the importance of a criminal Defendant's Sixth Amendment right to the effective assistance of Counsel, even if they are guilty. Particularly, the Court held:

> "The fact that respondent is guilty does not mean he was not entitled by the Sixth Amendment to the effective assistance of that he suffered no prejudice from his attorneys' deficient performance during plea bargaining."

See: Id.

Put differently, though a criminal Defendant, by agreeing to plead guilty, waives many Constitutional protections, he cannot waive, whether knowingly or unknowingly, the right to receive the effective assistance of Counsel in proceedings that occur prior to or after the decision was made to plead guilty. See, e.g.: Glover v. United States, 531 U.S. 198 (2001). Therefore, even though Daragjati agreed to plead guilty, he is nevertheless entitled to the effective assistance of Counsel during all phases of the criminal proceeding.

3. EFFECT OF WAIVERS CONTAINED IN DARAGJATI'S PLEA AGREEMENT

As discussed supra, the plea agreement executed in this case contained waivers that stipulated that Daragjati would not "appeal or otherwise challenge by petition pursuant to 28 U.S.C.

§2255 or any other provision, the conviction or sentence in the event the Court imposes a term of imprisonment of 63 months or below. This waiver is binding without regard to the sentencing analysis used by the Court" See: DE 25. With that said, these waivers, for the reasons stated below, should be deemed by the Court to be unenforceable.

For a plea agreement to be valid and enforceable, a criminal Defendant must enter into the agreement "knowingly, intelligently and with sufficient awareness of the relevant circumstances and likely consequences" See: United States v. Ruiz, 536 U.S. 622 (2002). In interpreting this controlling authority, this Circuit has explained that "to raise a claim despite a guilty plea or [] waiver, the Petitioner must show that the plea agreement was not knowing and voluntary because the advice he received from Counsel was not within the acceptable standards" See: Parisi v. United States, 529 F. 3d 134, 138 (2d Cir. 2008). To the extent that a criminal Defendant cannot show that Counsel's actions fell below the acceptable standards, the waivers contained in the plea agreement apply to "grounds that arose after as well as before he made the waiver" See: Garcia-Santos v. United States, 273 F. 3d 506, 509 (2d Cir. 2001).

In step with the Supreme Court's decision in Glover, supra, this Circuit has held that "a Defendant who executes a waiver may sign away the right to appeal, but he ...does not sign away the right to the effective assistance of Counsel. See: Nunez v. United States, U.S. Dist. LEXIS 78409 (S.D.N.Y. August 2, 2010) (quoting: Parisi, supra, at 138). For an appeal waiver to be valid, a criminal Defendant must not only know about the waiver, he must also understand what the waiver means. This requires Counsel and/or the Court to explain the waiver to the Defendant. This Circuit, in United States v. Munzon, 359 F. 3d 110, 115-116 (2d Cir. 2004), explained that this requirement is satisfied if the Court, at the change of plea hearing, asks the Defendant if he understands that the plea agreement contains an appellate and/or collateral attack waiver if the sentence falls within the agreed-upon range[2].

As discussed in greater detail Infra, during the pendency of the proceeding, Daragjati was not afforded his Constitutional guarantee of the effective assistance of Counsel, and as a result, the decision to enter into the plea agreement was not made with sufficient awareness of the consequences. Therefore, the collateral attack waiver contained in the plea agreement is not valid. The appellate waiver also fails, because, at no point prior to the plea agreement being accepted, did the Court, Franz and/or Fischetti specifically explain to Daragjati that, by accepting the plea agreement, he was waiving his right to appeal no matter what occurred in the proceeding, so long as the ultimate sentence imposed was below 63 months. See: Daragjati Declaration, Exhibit "A". In fact, the only mention of the appellate waiver during the change of plea hearing was in the following exchange between AUSA Tuchman, Fischetti, and Judge Kuntz:

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[2] - Specifically, in Munzon, the Court of Appeals held the following colloquy to be sufficient enough to put a criminal Defendant on notice regarding appellate waivers:

"**THE COURT:** There is a waiver of the right to appeal contained in the plea agreement that you will not filed a direct appeal or litigation under 28 U.S.C. §2255 or §2241 any sentence that is within or below the range of 37 to 46 months. Is that your understanding?
DEFENDANT: ...yes.:

See: Id., at 115-116.

"**MR. TUCHMAN:** ... as to the 63 months, I believe that [it] refers to the appellate waiver that's in the plea agreement.

MR. FISCHETTI: Right.

MR. TUCHMAN: And that the Defendant is agreeing not to appeal any sentence that is 63 months or below.

THE COURT: I was trying to subtly suggest that perhaps I had previously read that."

See: Change of Plea Hearing Transcript, p. 24, at 13-21 (brackets added).

After this exchange, the Court at no point asked Daragjati whether or not he understood or accepted what AUSA Tuchman and Fischetti had represented the plea agreement to say[2]. The Court's failure to elicit Daragjati's understanding regarding the appellate waiver fails to satisfy the standard set by this Circuit in Munzon, and this failure, coupled with Franz and Fischetti's failure to explain the consequences of the waiver[3], renders the appellate waiver unenforceable[22].

4. DARAGJATI'S FIRST CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL

Daragjati's first claim of ineffective assistance of Counsel complains that Franz and/or Fischetti were ineffective for failing to ask Judge Kuntz to recuse himself prior to sentencing. It is averred that, had Judge Kuntz, on motion from Daragjati's Counsel, recused himself, the outcome of the sentencing proceeding would have been different. It is respectfully averred that, even if Judge Kunt's prior involvement with the CCRB Panel were not enough, at the outset of the proceeding, to merit recusal[2] the request for recusal would have been appropriate after the Court made the ex parte request to the United States for Daragjati's employment and CCRB files.

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[2] - Interestingly enough, the Court went over nearly each and every other term of the plea agreement, and asked Daragjati to acknowledge on the record that he accepted and understood the specific terms.

[3] - To be clear, though Daragjati is attacking the waivers contained in the plea agreement, he is not attacking the plea agreement itself.

[22] - As discussed in Daragjati's Fourth Claim of Ineffective Assistance of Counsel, even in the appellate waiver is deemed enforceable, Counsel was still ineffective for failing to abide by Daragjati's expressed wishes to seek appellate review.

The controlling judicial recusal statutes are 28 U.S.C. §§144[3] and 455. With that said, Daragjati avers that Judge Kuntz's recusal was appropriate based upon the statutory provisions set forth in §455(a)(B)(1) and (3). To wit, each provides the following, in pertinent part:

> "Any Justice, Judge or Magistrate Judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned ... [or] (1) where he has a personal bias or prejudice concerning a party ... [or] (3) where he has served in government employment and in such capacity participated as Counsel, advocate or material witness concerning the proceedings or expressed an opinion concerning the merits of the particular case in controversy."

See: 28 U.S.C. §455(a)(B)(1)-(3).

The purpose of the judicial recusal statutes is to help ensure "confidence in the judiciary by avoiding the appearance of impropriety wherever possible" See: Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847, 865 (1988). With all due respect to Judge Kuntz, his actions at sentencing clearly establish that he came into the proceedings with pre-conceived notions. These pre-conceived notions were formed by Judge Kuntz's 28 years on the CCRB Panel.[2] Had Judge Kuntz not served on the CCRB Panel and not heard, according to his Judicial Biography, "hundreds of claims of police misconduct", he would not have been so quick to focus solely on the negative aspects of Daragjati's offenses, and would instead have weighed these negative aspects alongside the sentencing factors set forth in 18 U.S.C. §3553(a).

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[2] - See: Apple v. Jewish Hospital Medical Center, 829 F. 2d 326, 333 (2d Cir. 1987) (holding that a claim for recusal must be raised "at the earliest possible moment after obtaining knowledge or facts that demonstrate a basis for such a claim").

[3] - 28 U.S.C. §144 provides that:

> "Whenever a party to any proceeding in a District Court makes and files a timely and sufficient affidavit that the Judge before whom the matter is pending has a personal bias or prejudice, either against him or in favor of any adverse party, such Judge shall proceed no further therein, but another Judge shall be assigned to hear such proceeding."

See: 28 U.S.C. §144.

As the CCRB Chairwoman noted in her 2007 semi-annual report, there has long been tension between the members of the CCRB and the Police Department. In the words of the Chairwoman, this tension was caused by the Police Department's refusal to sanction officers whom the CCRB found to have acted inappropriately in the discharge of their official duties. It is respectfully averred that Judge Kuntz has carried this tension over to the bench, and when given an opportunity to punish a former NYPD Officer, he made it clear that, unlike when he served on the CCRB Panel, there was, on that day, no-one that would sit in a position to second-guess his decision, because, in Judge Kuntz's opinion, he and he alone was to preside over Daragjati's "earthly judgment day".

Judge Kuntz's bias and his past experience on the CCRB Panel led him to make an ex parte request for Daragjati's private CCRB file, and then, when provided with the file, use portions of that file in fashioning Daragjati's ultimate term of incarceration. In

[2] - To be clear, Daragjati's recusal claim is based solely upon Judge Kuntz's prior position on the CCRB Panel and his inappropriate ex parte requests, and is in no way based upon his ethnicity.

particular, Judge Kuntz relied upon conduct contained in the CCRB file that Daragjati never received a sanction from the NYPD for to conclude[2] that Daragjati had, during his interaction with Mr. Gray, displayed "obvious racial animus" See: ST 53:24[3] This conclusion was reached despite the fact that, at no point during his interaction with Mr. Gray did Daragjati utter a single racially-motivated statement, and that the evidence clearly supports that Daragjati only moved to detain Mr. Gray after he made disparaging remarks about Daragjati. Had Judge Kuntz conducted the objective and unbiased review of the facts that his position demands, it would have led him to determine that there was no "racial animus" involved, and would have, further, not led to the quoting of movie lines[22] and the uttering of inappropriate remarks directed towards private members of society.[23]

There is no dispute that Franz and Fischetti knew of Judge Kuntz's position on the CCRB Panel when he was "assigned" to the case. There is also no question that there has long been deep-seated animosity between members of the CCRB and the NYPD[2] The question is rather, why didn't Franz and Fischetti move to have Judge Kuntz recuse himself, if not before the ex parte request, then certainly after, if for not other reason than to eliminate even the appearance of impropriety. Had Franz and/or Fischetti asserted that Judge Kuntz could not objectively comply with this charge, it would have forced the Judge to "examine the relevant facts and the law and then decide whether a reasonable person knowing and understanding all the relevant facts" would favor recusal. See: United States v. Bayless, 201 F. 3d 116, 127 (2d Cir. 2005). This objective review would have led any reasonable person to conclude that Judge Kuntz's prior position with the CCRB would serve to prevent him from rendering an objective opinion in the case. See: United States v. Daley, 564 F. 2d 645, 651 (2d Cir. 1977) (holding that "there may be instances in which a Judge's behavior during prior proceeding can demonstrate friction between the Judge and the complaining party to support a finding of bias").

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[2] - The specific CCRB Complaint that Judge Kuntz relied upon alleged that Daragjati had told an Amfrican American to "shut your ni**er mouth." See: ST 49:25.

[3] - It is not known whether Judge Kuntz served on the CCRB Panel that reviewed this or any of Daragjati's other CCRB Complaints. However, given the mere possibility that he could have, it is respectfully submitted that this is, in and of itself, evidence enough to support recusal.

[22] - Admittedly, Judge Kuntz has a practice of using movie quotes in Court proceedings. This practice has been referred to by the Daily News as "odd". See: http://gothamist.com/2012/10/16/guilty_cop_calls_nypd_most_corrupt.php ("The Daily News reports oddly that Judge Kuntz 'referred to himself as "Father Vader" because his deep voice sounds like Star Wars villain Darth Vader'").

[23] - Judge Kuntz completely disregarded the numerous letters written on Daragjati's behalf, and as a partial justification for doing this, informed the authors of the letters that, while they are entitled to their opinions, their opinions were wrong. See: ST 54:3-8. This was despite the fact that some of the letters were written by members of the NYPD and by an African American lady whom Daragjati had assisted. See: Court Submission, Exhibit "F".

In sum, Franz and Fischetti's failure to seek Judge Kuntz's recusal led to the Court fashioning Daragjati's term of incarceration based upon a clear bias, a bias that unmistakably made fair judgment impossible. See: Liteky v. United States, 510 U.S. 540, 555 (1994) (holding that requests for recusal must show "deep seated favoritism or antagonism that would make fair judgment impossible"). In light of this proven error, both Strickland prongs have been satisfied, and Justice so demands that this Honorable Court grant Daragjati the Habeas relief he is seeking.

[2] - If the Court has concerns as to whether or not this animosity was present at the time Daragjati was sentenced, it need look no further than the ongoing controversy between the NYPD's Stop, Question and Frisk program as the CCRB has long advocated for the abolishment of the program, while the NYPD has argued for its continued implementation.

5. DARAGJATI'S SECOND CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL

Daragjati's second claim of ineffective assistance of Counsel complains that Franz and/or Fischetti failed to render the effective assistance of Counsel guaranteed by the Constitution when they, at sentencing, failed to object to Judge Kuntz's inappropriate statements and unsupported findings.

As discussed throughout this memorandum, Judge Kuntz, either because of his bias or because he was simply misinformed, made statements and formed conclusions that were wholly unfounded and/or inapprorpiate. For example, (1) determining that, because the City opted to settle several lawsuits for conduct that Daragjati allegedly perpetrated, it was evidence that Daragjati had acted inappropriately, even though, in actuality, there was no admission of guilt by the City or Daragjati, nor in any of the civil cases was there a formal complaint filed with the CCRB Panel, nor was there disciplinary action brought against Daragjati by the NYPD; (2) the ex parte request and inclusion of the otherwise confidential CCRB Panel findings, findings that Daragjati's supervisors felt not serious enough to merit a reprimand; and (3) the fact that Judge Kuntz felt it appropriate to compare Daragjati's actions to those of the fictional characters portrayed by actors in major motion pictures, comparisons that have no place in the criminal justice process. These clear errors went undocumented, and the Court was given full and unyielding range to sit in judgment at Daragjati's "earthly judgment day", because Franz and Fischetti completely disregarded their obligations.

While it is generally true that, when the Court, at sentencing, relies upon incorrect and/or inflammatory information, it does not form the basis of an ineffective assistance of Counsel claim if the Court imposes a within-guidelines term of incarceration (See: Mathurin v. United States, U.S. Dist. LEXIS 66055, at 23-25 (S.D.N.Y. 2007)), the Supreme Court, however, recently, in its decision styled Peugh v. United States, ___ U.S. ___ (2013), ruled that the guidelines in the post-Booker era are a guidepost and not a bright-line. In particular, the Supreme Court held that:

> "Our subsequent decisions [decisions subsequent to Booker] have clarified the role that the guidelines play in sentencing proceedings, both at the District Court level and when sentences are reviewed on appeal. First, a District Court should begin all sentencing proceedings by correctly calculating the applicable guideline range. As a matter of administration, and to secure nationwide consistency, the guidelines should be the starting point and initial benchmark. The District Court must then consider the arguments of the parties and the factors set forth in §3553(a). The District Court may not presume that the guidelines are reasonable and it may, in appropriate cases, imposed a non-guideline sentence."

See: Id. (internal citations omitted) (brackets added).

In applying the Supreme Court's recent interpretation to the facts present in Daragjati's second claim, it is clear that his admitted criminal actions fall squarely outside of the heartland of cases contemplated by the guidelines[2] With that said, this Circuit has explained the Hobbs Act in a criminal context to mean:

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[2] - See: Rita v. United States, 551 U.S. 338 (2007), holding there to be no presumption that guidelines should apply and that, as a result, a sentencing Court may have a case that "falls outside of the heartland to which the Commission intends individual guidelines to apply" See: Id.

> "Whoever in any way or degree obstructs, delays or effects commerce or the movement of any article or commodity in commerce by robbery or extortion or attempts or conspires to do so.... The term 'extortion' means the obtaining of property from another, with his consent, incited by wrongful use of actual or threatened force, violence, or fear, or under cover of official right.... The element of obtaining ... property entails a two-part inquiry: Whether a Defendant is (1) alleged to have carried out the deprivation of a property right from another, with (2) the intent to exercise, sell, transfer or take such analogous action with respect to that right."

See: United States v. Sekhar, 683 F. 3d 436, 440 (2d Cir. 2012) (internal citations omitted).

Daragjati's Hobbs Act Extortion charge did not, as do most of the other cases in this Circuit, involve the taking of another person's property or the undue influence over the property of another;[2] it involved the taking of Daragjati's own personal property. There is no dispute that Daragjati, in attacking John Doe 2, broke the law. He assaulted him; but these actions, even if they were a violation of the Hobbs Act, were not a garden-variety violation, and as such, did not merit a within-guidelines sentence. However, Judge Kuntz, because of his bias and/or misinformation, nevertheless imposed a sentence that was within the guidelines. Had Franz and/or Fischetti bothered to object to Judge Kuntz's improper and/or misinformed and inflammatory statements, the Court may have been more likely to impose a below-guidelines sentence, or, at a minimum, the errors would have been preserved for appellate review.

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[2] - For example, see: United States v. Markle, 628 F. 3d 58 (3d Cir. 2010) (Hobbs Act conviction affirmed based upon finding that Defendant attacked a person to secure constructions rights); See Also: United States v. Coppola, 671 F. 3d 220 (2d Cr. 2011) (same); United States v. Graham, U.S. App. LEXIS 17034 (2d Cir. 2012) (upheld Hobbs Act conviction based upon a finding that the Defendant kidnapped the victim after discovering that the victim attempted to conceal profits from stolen jewelry); United States v. Seminerio, U.S. Dist. LEXIS 92881 (S.D.N.Y. 2010) (refused to grant new trial to Defendant found guilty of Hobbs Act violation based upon a finding that the Defendant received payments from a contractor in exchange for providing the contractor with a government contract).

In light of the foregoing, Justice so demands that this Court find that Franz and/or Fischetti failed to render the effective assistance of Counsel when they failed to object to the Court's statements and findings at sentencing. As a result of these errors[2], the grant of Habeas relief is just and proper.

6. DARAGJATI'S THIRD CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL

Daragjati's third claim of ineffective assistance of Counsel complains that Fischetti and/or Franz were ineffective for failing to investigate the contents of the CCRB File and other pertinent records.

When Daragjati instructed Fischetti and Franz to investigate the contents of the CCRB File, he was told not to worry about it, because, in Counsel's opinion, the CCRB File was not material to guilt or innocence, and as a result, the Judge would not consider the File at sentencing. This averment could not have been further from the truth, as the CCRB File, whether rightly or wrongly, played a large role at sentencing. Unfortunately, however, Fischetti could not rebut any of Judge Kuntz's misstatements regarding the contents of the CCRB File, because he never bothered to carefully review the file when it was provided, or to investigate any of the complaints outlined therein.

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[2] - See: Glover v. United States, 531 U.S. 198, 203 (2001) (holding that Counsel's failure to object to sentencing errors satisfies both Strickland prongs.

Fischetti and Franz knew well in advance of sentencing that Judge Kuntz had requested Daragjati's CCRB File, and as a result, should have known, or at a minimum, prepared for the possibility, that Daragjati's CCRB File and employment record would play a role at sentencing. Yet, despite this, they conducted little or no review of the CCRB File, and no investigation whatsoever. Had an investigation into the complaints contained therein, or in any of the lawsuits involving Daragjati been conducted, they would have uncovered that (1) Mr. Gray had a pattern of disorderly conduct arrests, all of which he claimed were unconstitutional; (2) the complaints the CCRB said merited discipline, the NYPD said did not; and (3) the City chose to settle the lawsuits involving Daragjati based solely upon their belief that it would be less costly to settle the matters than to proceed to Trial. Had Judge Kuntz been presented with these undisputed facts, he would have been more likely to impose a term of incarceration that more accurately reflected the seriousness of Daragjati's offenses.[2]

It is well-settled that, if Counsel fails to investigate and thereafter present the results of any found mitigating evidence to the Court, they have failed to render the effective assistance of Counsel that the Constitution demands. See: Wiggins v. Smith, 539 U.S. 510 (2001); United States v. Herrera, 186 Fed. App'x 109, 112 (2d Cir. 2006); Johnson v. United States, 313 F. 3d 815, 818 (2d Cir. 2002). As discussed supra, Franz and Fischetti's

[2] - Admittedly, even if an investigation had taken place, given the bias that Judge Kuntz displayed, it is suspected that it would have been difficult for Franz and/or Fischetti to present any evidence that would have led him not to impose the sentence that he ultimately did.

actions clearly establish that they failed to investigate several critical portions of the factors that the Court considered at sentencing, and as a result of this error, Justice so demands that Daragjati be granted the Habeas relief he is seeking.

7. DARAGJATI'S FOURTH CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL

Daragjati's fourth and final claim of ineffective assistance of Counsel complains that Franz and Fischetti were per se[2] ineffective when they failed to file a Notice of Appeal after being instructed to do so.

When weighing claims of ineffective assistance of Counsel relating to Counsel's failure to seek appellate review, the Strickland test changes in a measurable way. That is, the Defendant must prove to the satisfaction of the Court that: (1) a rational Defendant would want to appeal; and (2) that he reasonably demonstrated to Counsel that he was interested in appealing. See: Sarroca v. United States, 250 F. 3d 785, 787 (2d Cir. 2001). If a criminal Defendant conveys a request to Counsel that he wants to appeal, and Counsel ignores that request, Counsel has acted "in a manner that is professionally unreasonable" See: Roe v. Flores-Ortega, 528 U.S. 470, 477 (2000). The Supreme Court held in Flores-Ortega that lawyers who disobey a client's expressed desire to appeal are "per se ineffective" and, as a result, the Defendant is not required to prove that he would succeed on appeal.

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[2] - The Second Circuit generally recognizes three categories of Sixth Amendment violations: (1) per se requires no showing of prejudice; (2) conflicts of interest that do not rise to the level of per se violations; and (3) ineffective assistance, requiring the satisfaction of the two-prong Strickland test. See, generally: United Sttaes v. O'Neil, 118 F. 3d 65 (2d Cir. 1997).

See: Flores-Ortega, at 472; See Also: Camposano v. United States, 442 F. 3d 770-71 (2d Cir. 2006) (holding that, even if an appeal lacks merit, a lawyer may not disregard a client's expressed desire to appeal).

This Circuit, in interpreting Flores-Ortega, has consistently held that "even when a Defendant has waived the right to appeal in a plea agreement, Counsel is per se ineffective if he fails to file a Notice of Appeal after being instructed by his client to do so" See: Jerez v. United States, U.S. Dist. LEXIS 18450 (S.D.N.Y. 2012) (quoting: Camposano, supra, 771-772).

As discussed supra, and as confirmed by the Declarations filed herewith, following the imposition of sentence, Daragjati expressed and articulated a strong desire to appeal the judgment imposed at sentencing. This strong desire was rebutted and ignored by Franz and Fischetti's repeated advisement that, no matter what occurred at sentencing, no appeal could or would be pursued, because the sentence "was within the stipulated guideline range" See: Nicole Daragjati Declaration, Exhibit "D"; See Also: Daragjati Declaration, Exhibit "A"[2]. However, applying the precedent set by this Circuit in Camposano, even if the appellate waiver contained in the plea agreement was enforceable, which is debatable, Daragjati nevertheless had the right to seek appellate review. If an appeal was filed, the United States could have thereafter petitioned the Appellate Court to dismiss the appeal on the basis of the

[2] - Daragjati asked that his wife contact Franz and/or Fischetti regarding his desire to appeal because he himself was unable to reach them, and after Fischetti failed to meet, as scheduled, following sentencing, he was concerned that he himself would be unable to convey his desire to appeal timely. See: Id.

waiver, and the burden would have been on Daragjati to then provide evidence to the Appellate Court to establish the invalidity of the waiver. The United States' right to ask the Appellate Court to enforce the waiver or Daragjati's charge to rebut the argument in no way affects his unwaivering Constitutional right to petition the Appellate Court for review.[2]

The plain and simple truth is that Daragjati's desire to seek appellate review went ignored by Counsel. By ignoring this expressed desire, Daragjati was denied the effective assistance of Counsel that the Constitution demands. This failure merits the grant of Habeas relief.[3]

IV. CONCLUSION

One of the great promises of America is that all accused shall be promptly brought before a Court and that Court shall decide guilt and punishment based solely upon the facts in front of it and not upon pre-conceived notions or biases. It is another great promise of America that all accused shall enjoy the effective assistance of Counsel during the pendency of a criminal proceeding. Unfortunately for Daragjati, he was denied both of these great promises.

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[2] - Had a Notice of Appeal been filed, and Fischetti and/or Franz felt that they could not, in good faith, pursue the appeal, the proper thing to do would have been to file the Notice of Appeal and then petition the Court to withdraw as Counsel.

[3] - In step with the standard set by this Circuit in Camposano, Daragjati would respectfully request, as it relates to this claim of ineffective assistance of Counsel, that this Honorable Court (1) conduct an evidentiary hearing to confirm that an appeal was requested; and (2) enter an order that will permit Daragjati to seek appellate review. See: Camposano, supra, at 776.

There is little doubt that Daragjati committed the acts which the United States alleged him to have committed, but this does not mean he should not be entitled to the same Comstitutional protections that every other criminal Defendant enjoys. Because of the denial of these Constitutional protections, Justice so demands that Daragjati be granted the post-conviction relief requested herein.

WHEREFORE, for the reasons stated herein, and as supported by the attached motion and exhibits filed herewith, Daragjati prays that this Honorable Court enter an order **GRANTING** him the reasonable and equitable relief requested herein.

Respectfully Submitted,

Michael Daragjati
79644-053
Federal Satellite Low Elkton
P.O. Box 10
Lisbon, Ohio 44432

EXHIBIT "A"

DARAGJATI DECLARATION

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------------------------------X
UNITED STATES OF AMERICA,

Plaintiff/Respondent,

v.

MICHAEL DARAGJATI,

Defendant/Movant.
----------------------------------X

Criminal No. 1:11-cr-00838-WFK-1

Civil No. ______________________

DECLARATION OF MICHAEL DARAGJATI

* * * * * * * *

I, Michael Daragjati, do hereby swear, affirm and declare under penalty of perjury, that the following statements are, to the best of my reasonable information and belief, true, correct and accurate:

1) My full name is Michael Daragjati;

2) I am an adult male who has previously reached the age of majority;

3) Prior to my incarceration, I resided within the geographical boundaries of Richmond County, New York;

4) I have not previously been declared incompetent by a Court or health professional;

6) I was represented in the above-styled proceeding primarily by Eric P. Franz ("Franz") and Ronald P. Fischetti ("Fischetti"). Based upon my informed belief, both Franz and Fischetti were, at all times relevant, licensed to engage in the practice of law within the State of New York and were further permitted to appear in front of the United States District Court in and for the Eastern District of New York;

7) I have learned from publicly-available sources that the person the United States has referred to as John Doe 2 has an extensive criminal record. This criminal record involves the thefts of personal property. Based upon my informed belief, John Doe 2 has stolen personal property from other members of the New York City Police Department ("NYPD"). I now believe that John Doe 2 had a role in the theft of my snowplow;

8) Prior to my incarceration, I owned and operated a snow-removal and home improvement business;

9) I never consentend to the recording of any of the telephonic conversations that took place between myself and the Confidential Informant referenced by the United States in its Criminal Complaint;

10) Based upon my informed belief, the Stapleton neighborhood of Staten Island has a high rate of crime;

11) On April 15, 2011, I "Stopped, Questioned and Frisked" Mr. Gray in accordance with the established protocol of the NYPD;

12) After telling Mr. Gray he could leave, he instructed me to "suck his di** pig";

13) I am from a large and supportive family. Following my arrest, I instructed my family to seek out and retain Counsel to defend me;

14) When I first met with Franz, I told him that I wanted to "fight the charges against me";

15) When Fischetti ultimately joined my defense team, he

16) I decided to waive my right to be indicted by a Grand Jury and my right to be tried by a jury of my peers based upon the representations and assurances of Franz and Fischetti. These representations and assurances include, but are not necessarily limited to, the following:

A) An assurance that race would not play a role in fashioning my prison sentence;

B) An assurance that the United States would not oppose a below-guidelines sentence; and

C) A representation that the wire fraud count alleged in the complaint would not be prosecuted;

17) Prior to the above-styled case, I have had not serious run-ins with law enforcement;

18) Franz informed me that the United States had told him that the had not requested, nor would they include at sentencing, any portion of the Citizen Complaint Review Board ("CCRB") File, and further, that in providing the File, they were simply complying with the Court's request;

19) I was repeatedly told by Franz and Fischetti that my CCRB File would not be considered by the Court at sentencing, and as a result, there was no need to waste time and resources reviewing and investigating the File;

20) Fischetti told me that, given the factors present in my case, though he could not guarantee a below-guidelines term of incarceration, he felt that a below-guidelines sentence was possible;

21) Fischetti told me that he could handle any surprise at sentencing on his feet;

22) Following sentencing, Fischetti told me that he would "stop by in a few days" to discuss things;

23) Following sentencing, I was astounded when other inmates at MDC Brooklyn brought me copies of news articles wherein Fischetti publicly declared me to be a racist;

24) Another inmate at MDC Brooklyn who was sentenced after me, told me that his attorneys instructed him to tell me that I needed to appeal my sentence because what the Judge did "was wrong";

25) Following my sentencing, I had a "gut feeling" that what the Judge did at sentencing was improper. This "gut feeling" led to me wanting to appeal;

26) Shortly after sentencing, I instructed my wife to contact Franz and/or Fischetti and to tell them to appeal my sentence;

27) Approximately five weeks after sentencing, Franz came to visit me at MDC Brooklyn. During this meeting, I instructed Franz that I wanted to appeal. He responded with the representation that I could not, because my plea agreement forbade it;

28) At no point prior to sentencing did Franz, Fischetti, and/or the Court explain to me that "no matter what occurred at sentencing, I could not appeal the sentence imposed if the sentence was below 63 months";

29) I offer this declaration in good faith.

WITNESS MY HAND THIS 26th **DAY OF JUNE, 2013.**

Witness

Michael Daragjati

EXHIBIT "B"

DECLARATION OF MARK DARAGJATI

UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, Plaintiff, v. MICHAEL DARAGJATI, Defendant.	Case No. 11-CR-838(WFK)

DECLARATION OF MARK DARAGJATI

* * * * * * * * *

I, Mark Daragjati, do hereby swear, affirm and declare under penalty of perjury that the following statements are, to the best of my reasonable information and belief, true, correct and accurate:

1) My full name is Mark Daragjati;

2) I am an adult male who has previously reached the age of majority;

3) I reside within the geographical boundaries of Richmond County, New York;

4) I have not previously been declared incompetent by a Court or health professional;

5) I am the brother of Michael Daragjati ("Daragjati");

6) I have first-hand knowledge and a reasonable recollection of certain events, actions, conversations, etc., that took place during the pendency of the above-styled case involving Daragjati;

7) Throughout the pendency of the above-styled case, I attended numerous meetings involving the attorneys retained to represent Daragjati;

8) During one of the meetings identified in ¶7, I specifically recall Ron Fischetti ("Fischetti") advising that he could not personally represent Daragjati in the above-styled matter because of the charges with which he was charged. Fischetti, however, advised that his associate, Eric Franz, could. It was my understanding then and my belief now that Fischetti could not represent Daragjati initially because of his position on the New York Commission on Civil Rights;

9) I recall at some point prior to Daragjati's sentencing in the above-styled matter, being advised by Fischetti that he could now represent Daragjati, because "race was no longer than an issue";

10) I recall Daragjati advising me shortly after his sentencing in the above-styled matter that he instructed his wife, Nicole Daragjati, to contact his attorneys so that he could pursue an appeal;

11) The Daragjati that I know would give you the shirt off his back if he thought you needed it;

12) I offer this declaration in good faith.

WITNESS MY HAND THIS 10th **DAY OF** June, **2013.**

Witness

Mark Daragjati

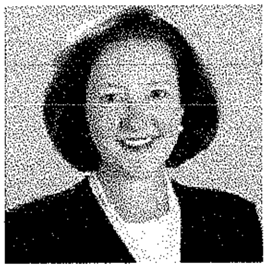
Witness

DEBORAH CASALE
NOTARY PUBLIC, State of New York
No 01CA6163669
Qualified in Richmond County
My Commission Expires April 02, 2015

EXHIBIT "C"

LETTER FROM THE CHAIR

LETTER FROM THE CHAIR



Thank you for taking the time to read the CCRB's January-June 2007 semiannual report. For the third year, this report presents statistics on the agency's activities in a visual, user-friendly manner. We hope it makes clear some of the trends in complaint activity and accomplishments by our agency.

The first half of 2007 was a significant time for the CCRB. Our complaint rate continued to rise, fueled by a dramatic increase in the number of stops conducted by police officers, first documented by the CCRB in 2005 and confirmed by the Police Department in 2006. We were able to hire a team of attorneys who will evaluate investigations and advise investigators of legal issues in their cases. The attorneys will be particularly helpful as the number of stop-and-frisk cases increases, since these cases require legal analysis. This year the CCRB also participated in town hall meetings organized by the City Council on police accountability and at the Police Academy's Immersion Training program for all graduating recruits in June. We appreciate being included in the ongoing public debate on issues that are of concern to all New Yorkers, such as the increase in the stop and frisk rate and the use of police force.

Most importantly, the CCRB continued to conduct thorough, fair, and timely investigations. While the long-term increase in complaints has had some impact on our performance, we are closing more cases every year than ever before, and doing so without sacrificing quality or timeliness. This success speaks to the devoted work of our skilled investigators and our dedicated board members.

We continue to see, however, a discrepancy between our disciplinary recommendations on cases and their actual outcome at the police department. As this report shows, the rate at which the department has chosen to not discipline officers whom the CCRB found committed misconduct is at an all-time high. We continue to work with the department to resolve our differences, and look forward to seeing progress in this matter.

On the whole, 2007 continues to be a successful year for our agency, and I look forward to our progress continuing into 2008.

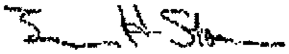


EXHIBIT "D"

NICOLE DARAGJATI DECLARATION

UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, Plaintiff, v. MICHAEL DARAGJATI, Defendant.	Case No. 11-CR-838(WFK)

DECLARATION OF NICOLE DARAGJATI

* * * * * * * *

I, Nicole Daragjati, do hereby swear, affirm and declare under penalty of perjury that the following statements are, to the best of my reasonable information and belief, true, correct and accurate:

1) My full name is Nicole Daragjati;

2) I am an adult female who has previously reached the age of majority;

3) I reside within the geographical boundaries of Richmond County, New York;

4) I have not previously been declared incompetent by a Court or health professional;

5) I am the wife of Michael Daragjati ("Daragjati");

6) I have first-hand knowledge and a reasonable recollection of certain events, actions, conversations, etc., that took place during the pendency of the above-styled case involving Daragjati;

7) Throughout the pendency of the above-styled case, I attended numerous meetings involving the attorneys retained to represent Daragjati;

8) During one of the meetings identified in ¶7, I provided Daragjati's attorney with copies of his New York Police Department arrest records and performance evaluations. It was during this meeting that I expressed Daragjati's desire to have his Civilian Review Board files reviewed by Counsel prior to sentencing. In response to this, I was advised by one or more of Daragjati's attorneys that the files were not relevant to the United States' case and/or the defense they intended to mount in support of Daragjati's interests;

9) During one or more of the meetings identified in ¶7, I specifically recall one or more of Daragjati's attorneys, stating that "race" would not play a factor in the Court fashioning Daragjati's sentence;

10) Shortly after the Court in the above-styled proceeding imposed judgment, Daragjati contacted me and instructed me that I contact his attorneys and advise them that he wanted to appeal. Consistent with Daragjati's request, I contacted Eric Franz ("Franz"). Franz advised me that Daragjati could not appeal because the plea agreement that was entered into contained a waiver that stated he would not appeal if the sentence was within the stipulated sentence guideline range. Following my conversation with Franz, I explained his advisement to Daragjati;

11) I have never known Daragjati to be anything more than an honest and hardworking man who works hard to provide for his family;

12) In all of my interactions with, and all my years knowing Daragjati, I have never known him to be a racist;

13) I offer this declaration in good faith.

WITNESS MY HAND THIS 10th **DAY OF** June, **2013.**

Witness

Nicole Daragjati

Deborah Casale

Witness

DEBORAH CASALE
NOTARY PUBLIC, State of New York
No 01CA6163669
Qualified in Richmond County
My Commission Expires April 02, 2015

EXHIBIT "E"

JAK DARAGJATI DECLARATION

UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, Plaintiff, v. MICHAEL DARAGJATI, Defendant.	Case No. 11-CR-838(WFK)

DECLARATION OF JAK DARAGJATI

* * * * * * * *

I, Jak Daragjati, do hereby swear, affirm and declare under penalty of perjury that the following statements are, to the best of my reasonable information and belief, true, correct and accurate:

1) My full name is Jak Daragjati;

2) I am an adult male who has previously reached the age of majority;

3) I reside within the geographical boundaries of Richmond County, New York;

4) I have not previously been declared incompetent by a Court or health professional;

5) I am the brother of Michael Daragjati ("Daragjati");

6) I have first-hand knowledge and a reasonable recollection of certain events, actions, conversations, etc., that took place during the pendency of the above-styled case involving Daragjati;

7) Throughout the pendency of the above-styled case, I attended numerous meetings involving the attorneys retained to represent Daragjati;

8) Following Daragjati's sentencing in the above-styled case, while leaving the Courthouse, I asked Daragjati's lawyer, Eric Franz, if Daragjati could appeal the Judge's order. Franz, however, advised me that there was no way to appeal, due to the language of the plea agreement. I later conveyed this conversation to Daragjati;

9) Following Daragjati's sentencing in the above-styled case, I can recall that, during one of the meetings identified in ¶7, Daragjati's lawyers and I got into a verbal disagreement because of their ill-informed belief that his Citizen's Complaint Review Board files would not play a role in fashioning Daragjati's sentence;

10) I offer this declaration in good faith.

WITNESS MY HAND THIS 16 **DAY OF** June**, 2013.**

Cathn Odl
Witness

Jak Daragjati

____
Witness

EXHIBIT "F"

COURT SUBMISSION

2-21-2012

To Honorable William F Kuntz, II

Dear Sir, my name is Anna Varella, I am A 72 yr old woman who Resides By my self At 160 Lamport Blvd ST ny 10305. I Am writing this letter in Regards to Michael Daragjati's, Sentencing I want to tell you what kind of person he was while he was working Downstairs. When he Just got Assigned here; He Did not know me At All Once we got to know eachother he would Always stop And talk to me, He knew I had A Bi-Racial 15 mth Old Grandson who passed Away. He Came in the next Day, with A hand Carved Cross that He made out of wood I was so taken By emotion that I Cryed. Then & there I knew he was A Good Hearted person. So please put me on the Record in support of Him. Thank You your Honor.

Sincerly
Anna Varella
ANNA VARELLA

CERTIFICATE OF SERVICE AND DECLARATION
IN COMPLIANCE WITH 28 U.S.C. §1746

KNOW ALL MEN BY THESE PRESENTS:

I, Michael Daragjati, do hereby declare under penalty of perjury that on the 26th day of June, 2013, I sent via the established legal mail protocol at the Federal Correctional Institution where I am housed, the original and the appropriate number of true and correct copies of the foregoing motion and memorandum to the persons listed below:

United States District Court Clerk
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

WITNESS MY HAND THIS 26th DAY OF JUNE, 2013.

Witness

Michael Daragjati